SUPREME COURT, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

October Term, 1997

KUMHO TIRE COMPANY, LTD., KUMHO U.S.A., INC., and HERCULES TIRE & RUBBER COMPANY, INC.,

Petitioners,

v.

PATRICK CARMICHAEL, AN INDIVIDUAL AND FATHER AND NEXT OF KIN TO PATRICK CARMICHAEL, JR., A MINOR, LUZVIMINDA CARMICHAEL, AN INDIVIDUAL, MOTHER AND NEXT FRIEND OF CARINA HORN, A MINOR, AND ADMINISTRATRIX OF THE ESTATE OF JANICE HORN, CARINA HORN, A MINOR, LEONA CARMICHAEL, SHAMEELA CARMICHAEL, NATIMAH CARMICHAEL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a trial judge consider the four factors set out by this Court in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in a Rule 702 analysis of admissibility of an engineering expert's testimony?

LIST PURSUANT TO RULE 29.6

Petitioner Kumho Tire Company, Ltd. ("Kumho"), formerly known as Kumho & Company, Inc., is a publicly-traded corporation organized and existing under the laws of the Republic of Korea (South Korea). Kumho owns an interest in the following publicly-traded South Korean companies: Asiana Airlines, Inc.; Kumho Construction & Engineering, Inc.; Korea Kumho Petrochemical, Ltd.; Kumho Telecom Co., Ltd.; Kumho Investment & Finance Co., Ltd.; and Kumho Development, Inc. Kumho has no subsidiaries other than wholly-owned subsidiaries. All of the Kumho entities that are publicly held are traded on the South Korean Stock Exchange. In 1984, Samyang Tires, Inc., the first-named defendant in the proceedings below, was merged into Kumho with Kumho being the surviving corporation.

Petitioner Kumho U.S.A., Inc. is a California corporation and a wholly-owned subsidiary of Kumho. It has no subsidiaries.

Petitioner Hercules Tire & Rubber Company, Inc. is a closely-held Ohio corporation with no subsidiaries other than wholly-owned subsidiaries. It owns a stake in the following closely-held corporations: Carmerica Corporation; Tire Depot, Inc.; and Zhongken-Hercules Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on December 23, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 131 F. 3d 1453 (11th Cir. 1997) and is reprinted in the Appendix ("App.") at A. 1a. The opinion and judgment of the District Court is reported at 93 F. Supp. 1514 and is reprinted at App. B. 1b. The District Court's unpublished opinion ruling on respondents' motion for reconsideration is reprinted at App. C. 1c.

JURISDICTION

On April 1, 1996, the District Court entered its judgment excluding the testimony of respondents' engineering expert and granting summary judgment in favor of petitioners. App. 1b. On June 5, 1996, the District Court granted the respondents' motion for reconsideration and, on reconsideration, affirmed its previous decision with additional reasons. App. 1c. On December 23, 1997, the United States Court of Appeals for the Eleventh Circuit entered its judgment reversing the District Court's judgment. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RULES INVOLVED IN THIS CASE

Federal Rules of Evidence

Rule 104:

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness and so requests.

Rule 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education,

may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

Respondents sued petitioners in the United States District Court for the Southern District of Alabama claiming that a defect caused the failure of a five-year-old tire manufactured by petitioner Kumho[1] and the ensuing automobile accident during which respondents suffered injuries. Jurisdiction was predicated on 28 U.S.C. § 1332 (diversity). Respondents alleged violation of the Alabama Extended Manufacturers Liability Doctrine (AEMLD),[2] negligence, wantonness, and breach of warranty.

In support of their claims, respondents offered testimony of a mechanical engineering expert, Dennis Carlson. Before he had even seen, much less inspected, the tire, Carlson issued a report containing his opinion that the tire failed due to a manufacturing defect. Carlson later testified that the tire failure was the result of a design *or* manufacturing defect; however, Carlson could not specifically say whether the defect was one of design or manufacturing, nor could he identify the defect.

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[1] The other petitioners were not involved in the design or manufacture of the tire. Kumho designed and manufactured the tire on behalf of Hercules Tire & Rubber Company, Inc. Kumho U.S.A., Inc., a wholly-owned subsidiary of Kumho, may have been involved in the distribution of the tire. Samyang Tires, Inc. merged into Kumho in 1984.

[2] *See Casrell v. Altec Industries, Inc.*, 335 So. 2d 128 (Ala. 1976).

After the completion of discovery, petitioners filed motions to exclude Carlson's testimony and for summary judgment. The District Court granted the motions to exclude and entered summary judgment for petitioners. App. 1b. Applying Fed. R. Evid. 702 and considering the four *Daubert* factors, the District Court found:

> Carlson's testimony is simply too unreliable, too speculative, and too attenuated to the scientific knowledge on which it is based to be of material assistance to the trier of fact; hence, it cannot be accorded the status of admissible expert testimony.

App. 18b. The District Court rejected respondents' argument that Carlson's testimony was a mere technical analysis, rather than scientific evidence, and that such testimony was therefore exempted from *Daubert*-style scrutiny.

> The Plaintiffs [respondents] may be correct that Carlson's testimony does not concern a scientific concept per se; however, it certainly is testimony about an application of scientific concepts involved in physics, chemistry, and mechanical engineering. In other words, Carlson's method is necessarily grounded in some scientific foundation. . . .

App. 17b-18b.

Respondents moved the District Court to reconsider its judgment excluding their expert and dismissing the case. On June 5, 1996, the District Court granted the motion to reconsider and, on reconsideration, affirmed its previous decision with additional reasons. App. 1c. Respondents' primary argument was that the District

Court had improperly applied the four *Daubert* criteria in a rigid manner, but the District Court clarified that this was not the case:

> Contrary to plaintiffs' assertions, the Court did not convert the flexible *Daubert* inquiry into a rigid one; rather, the Court simply found the *Daubert* factors appropriate, analyzed them, and discerned no competing criteria sufficiently strong to outweigh them. As such, the Court's analysis complied with both the letter and spirit of *Daubert*. Accordingly, this ground for reconsideration lacks merit.

App. 4c-5c. The District Court also found that "[i]n this case, application of the *Daubert* factors did operate to gauge the reliability of Carlson's methods." App. 4c.

The District Court considered, but rejected, respondent's contention that Carlson's methods were reliable because they had been derived from reading depositions of other tire-failure experts:

> [T]he fire of litigation is not an atmosphere which is conducive to careful, well-reasoned, scholarly analysis, critique, and review of the scientific underpinnings of expert testimony. See *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 43 F. 3d 1311, 1317 (9th Cir. 1995) (we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office).

App. 5c-6c. Therefore, the District Court again held that Carlson's methodology was not reliable and affirmed its April 1, 1996, order.

The Respondents timely appealed the District Court's judgment to the Court of Appeals. The Court of Appeals reversed, holding that the District Court's analysis was flawed as a matter of law because it improperly applied a *Daubert* analysis to non-scientific testimony. App. 2a.

The Court of Appeals first reviewed this Court's *Daubert* opinion and remarked: "In fact, the Supreme Court in *Daubert* explicitly limited its holding to cover only the 'scientific context'." App. 5a. (citing *Daubert*, 509 U.S. at 590, n. 8). Then, the Court of Appeals considered the distinction between scientific and non-scientific evidence and in so doing rephrased the question presented:

> Thus, the question presented in this case is whether Carlson's testimony is based on his application of scientific principles or theories (which we should submit to a *Daubert* analysis) or on his utilization of personal experience and skill with failed tires (which we would usually expect a district court to allow a jury to evaluate).

App. 7a.

The Court of Appeals, without explicitly stating it was doing so, next rejected the District Court's finding that Carlson's testimony was necessarily grounded in an application of scientific concepts:

> Having clarified the question posed by this case, it seems apparent to us that Carlson's testimony is non-scientific. Although Samyang is no doubt correct that the laws of physics and chemistry are implicated in the failure of the Carmichaels' tire, Carlson makes no pretense of basing his opinion on any scientific theory of physics or chemistry. Instead, Carlson rests his opinion on his experience in analyzing failed tires. After years of looking at the mangled carcasses of blown-out tires, Carlson claims that he can identify tell-tale markings revealing whether a tire failed because of abuse or defect. Like a beekeeper who claims to have learned through years of observation that his charges always take flight into the wind, Carlson maintains that his experiences in analyzing tires have taught him what "bead grooves" and "sidewall deterioration" indicate as to the cause of a tire's failure. Indeed, Carlson asserts no knowledge of the physics or chemistry that might explain why the Carmichaels' tire failed. Thus, we conclude that Carlson's testimony falls outside the scope of *Daubert* and that the District Court erred as a matter of law by applying *Daubert* in this case.

App. 8a. (footnote omitted). The Eleventh Circuit reversed and remanded the case to the District Court for further proceedings "to determine if Carlson's testimony is sufficiently reliable and relevant to assist a jury." App. 9a.

REASONS FOR GRANTING THE WRIT

The lower federal courts have inconsistently applied this Court's *Daubert* analysis to testimony by engineering experts. A sharp split among the circuits has developed, with five circuits having found *Daubert* inapplicable to an engineering expert's testimony and five circuits concluding *Daubert* does indeed apply to such testimony. The better view, contrary to the Court of Appeals' decision in this case, is that *Daubert* applies to expert engineers. Most

importantly, application of *Daubert* to expert engineers would drive the quality of such expert evidence in the right direction by ensuring the reliability of their analyses and methods before admitting their testimony.

A second reason for granting the writ stems from the Eleventh Circuit's misapplication of this Court's recent decision in *General Electric Co. v. Joiner*, 522 U.S. ___, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). While acknowledging the abuse-of-discretion standard of review established in *Joiner*, the Court of Appeals disregarded the District Court's factual finding that the expert's testimony was necessarily rooted in the application of scientific concepts. This finding of the District Court clearly was not an abuse of its discretion.

Finally, the Court should review the issue presented because it is important. In many cases – and in virtually all product liability claims – a decision to exclude an engineering expert's testimony will be outcome-determinative. This case presents the logical next step for the Court in developing "this important area of the law." *Daubert, supra*, 509 U. S. at 601 (Rehnquist, C. J., concurring in part and dissenting in part).

I. A SHARP CONFLICT EXISTS AMONG THE CIRCUITS.

The Court of Appeals reversed because it found the District Court erred as a matter of law in applying the *Daubert* factors to the testimony of an engineering expert – testimony that the District Court found was "necessarily grounded" in the application of scientific principles. App. 18b. The Eleventh Circuit's holding, while

following the opinions of several circuits on this issue, directly conflicts with decisions of several other circuits.

There now exists a well-developed division among the circuits concerning whether expert engineering testimony is properly analyzed under *Daubert*.[3] As it currently stands, the Third, Fifth, Sixth, Seventh, and Eighth Circuits have held that a trial judge may consider the *Daubert* factors in reviewing admissibility of expert engineering testimony, while the Second, Fourth, Ninth, Tenth and Eleventh Circuits have held the opposite.[4] An analysis of the leading cases from the circuits follows.

A. *Daubert* Does Not Apply To Expert Engineers.

Tenth Circuit:

The Tenth Circuit first considered the question presented. In *Compton v. Subaru of America, Inc.*, 82 F. 3d 1513, 1519 (10th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 611, 136 L. Ed. 2d 536 (1996), *rehearing denied*, ___ U.S. ___, 117 S. Ct. 1022, 136 L. Ed. 2d 897 (1997), the court stated:

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[3] As the cases cited herein demonstrate, it appears the circuits generally agree that a district judge must exercise a "gatekeeper" role in assessing the reliability and relevance of *all* expert testimony. While the circuit courts also agree that the four indicia of reliability set out in *Daubert* apply to "scientific" testimony, they have gone in opposite directions on the question of whether such criteria apply to expert engineers and nonscientific experts.

[4] While the First and District of Columbia Circuits have not spoken to this precise issue, this should not lead the Court to delay review of the important question presented which ultimately it will have to decide.

> we do not believe *Daubert* completely changes our traditional analysis under Rule 702. Instead, *Daubert* sets out additional factors the trial court should consider under Rule 702 if an expert witness offers testimony based upon a particular methodology or technique.

The court therefore held that it was inappropriate to apply a *Daubert* analysis to the testimony of an aerospace and mechanical engineering expert. The Court reasoned that, because the expert's testimony was not based on any particular methodology or technique but rather "upon general engineering principles and his twenty-two years of experience as an automotive engineer," the *Daubert* factors were inapplicable. *Id.* The Court thus announced its general rule, since adopted by several other circuits, that *Daubert* does not apply unless the expert employs a particular methodology or technique. *Cf., United States v. Muldrow*, 19 F. 3d 1332, 1337-38 (10th Cir. 1994), *cert. denied*, 513 U.S. 862 (1994) (*Daubert* properly applied to forensic chemist's expert testimony but was inapplicable to expert testimony by a police officer).

Fourth Circuit:

Following *Compton, supra*, the Fourth Circuit has held that a *Daubert* analysis is inappropriate where an expert relies on his experience or training rather than a particular methodology. *Freeman v. Case Corporation*, 118 F. 3d 1011, 1016 n. 6 (4th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 739, ___ L. Ed. 2d ___ (1998) (affirming a rejection of a *Daubert* challenge to a mechanical engineer's testimony that the design of a mower's brakes was defective); *see also, Marilyn Casualty Co. v. Therm-O-Disc, Inc.*, 1998 U.S. App. LEXIS 3852, at *10 (4th Cir. Feb. 27, 1998) (holding that the trial court was not required to consider the four *Daubert* factors in deciding admissibility of testimony of an electrical engineering expert).

Ninth Circuit:

"We agree that the district court erred in applying the *Daubert* factors, which are relevant only to testimony bearing on 'scientific' knowledge, to [a mechanical engineer's] testimony." *McKendall v. Crown Control Corp.*, 122 F. 3d 803, 806 (9th Cir. 1997). The *McKendall* court found *Compton, supra*, instructive and stated that cross-examination could be used "to point out that [the engineer] has not created or tested the safety device which he suggests would have prevented the accident." *Id.* at 807-08;[5] *see also, United States v. Bighead*, 128 F. 3d 1329, 1330 (9th Cir. 1997) ("we have already indicated that *Daubert*'s tests for the admissibility of expert scientific testimony do not require exclusion of expert testimony that involves specialized knowledge rather than scientific theory"); *cf., Masayesva for and on Behalf of Hopi Indian Tribe v. Hale*, 118 F. 3d 1371 (9th Cir. 1997), *cert. denied, Hale v. Secakuku*, ___ U.S. ___, 118 S. Ct. 1048, ___ L. Ed. 2d ___ (1998) (*Daubert* not applicable to expert economist's testimony as not

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[5] In addition, the *McKendall* court attempted to reconcile the seemingly conflicting pronouncements of the Ninth Circuit as to whether *Daubert* applies to all expert testimony or only to scientific knowledge. *Id.* at 806 n. 1. Generally, the court stated, *Daubert* applies to all expert testimony in that district courts are the gatekeepers and should pay particular attention to the reliability of the expert and his or her proffered testimony. However, the court found, the four *Daubert* criteria do not apply except in cases involving scientific testimony. *Id.* at 806.

novel scientific theory); *but cf., United States v. Artero*, 121 F. 3d 1256, 1262 (9th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 1089, ___ L. Ed. 2d ___ (1998) (*Daubert* applied to exclude nonreliable statistical study); *Schudel v. General Electric Co.*, 120 F. 3d 991, 997 (9th Cir. 1997), *petition for cert. filed* (Feb. 23, 1998) (Nos. 97-1382, 97-1386, 97-1410) (abuse of discretion to admit medical expert's testimony when witness "could not testify to a specific cause and effect relationship" between chemical exposure and health problems).

Eleventh Circuit:

In the case at hand, *Carmichael v. Samyang Tire, Inc.*, 131 F. 3d 1433, 1436 (11th Cir. 1997), the Court of Appeals held *Daubert* covers only the "scientific context" and did not apply to a mechanical engineer's testimony about the cause of a tire failure. App. 5a. The Eleventh Circuit found that an expert engineer's testimony was more "like a beekeeper" in that it was based on observations and experience and not on application of science. App. 8a. In so holding, without explicitly stating, the court thus rejected the District Court's finding that the testimony of the particular expert at issue was "necessarily" scientific. *Compare* App. 8a to App. 18b; *but cf., United States v. Lee*, 25 F. 3d 997, 999 (11th Cir. 1994) ("*Daubert* applies not only to testimony about scientific concepts but also to testimony about actual application of those concepts").

Second Circuit:

The court has held that it was error to exclude, pursuant to *Daubert*, the testimony of a mechanical engineer that a baggage-delivery system was unreasonably unsafe for older people. *Stagl v. Delta Air Lines, Inc.*, 117 F. 3d 76, 82 (2d Cir. 1997); *see also, Iacobelli Construction, Inc. v.*

County of Monroe, 32 F. 3d 19, 25 (2d Cir. 1994) (lower court's "reliance on *Daubert* was misplaced" in excluding testimony by geotechnical expert and underground construction expert.); *cf., Tamarin v. Adam Caterers, Inc.*, 13 F. 3d 51, 53 (2d Cir. 1993) (refusing to extend *Daubert* analysis to testimony by expert accountant).

B. *Daubert* Applies To Expert Engineers.

Sixth Circuit:

In *Smelser v. Norfolk Southern Ry. Co.*, 105 F. 3d 299, 303-04 (6th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 67, 139 L. Ed. 2d 29 (1997), the court found the trial court erred by not applying the *Daubert* criteria in assessing admissibility of a biomechanical engineer's testimony. *See also, American & Foreign Ins. Co. v. General Electric Co.*, 45 F. 3d 135, 138-39 (6th Cir. 1995) ("although the lower court's judgment in this case pre-dated *Daubert*, the court clearly took into account all the relevant considerations required by that case" in excluding the testimony of an electrical engineer); *cf., Cook v. American Steamship Co.*, 53 F. 3d 733, 739 (6th Cir. 1995) (finding that the plaintiff's failure analysis expert's testimony was properly excluded because it was not based on valid scientific methodology and was, in that sense, not expert testimony under Rule 702); *Berry v. City of Detroit*, 25 F. 3d 1342, 1350-51 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995) (applying the four *Daubert* factors to testimony of a non-scientific expert).

Seventh Circuit:

The Seventh Circuit has held that the *Daubert* factors are properly applied to testimony by an engineering

expert regarding the feasibility of alternative designs and the adequacy of warnings and instructions. *Cummins v. Lyle Industries*, 93 F. 3d 362, 370 (7th Cir. 1996). The *Cummins* court rejected plaintiffs' argument that *Daubert* applied only to novel scientific testimony:

> The Supreme Court did acknowledge in *Daubert* that, because the case presented a matter of scientific inquiry, its discussion was limited to the 'scientific context.' *Daubert*, 509 U.S. at 590 n. 8, 113 S. Ct. at 1295 n. 8. The Court also noted, just as pointedly, that its holding was not limited to cases involving 'novel' scientific theories. *Id.* at 592 n. 11, 113 S. Ct. at 2796 n. 11.

93 F. 3d at 367, n. 2. The Seventh Circuit went on to state that, regardless of whether the offered testimony was "scientific" or "technical," "the basic task of the District Court remains essentially the same – to insure that the evidentiary submission is of an acceptable level of evidentiary reliability." *Id.*; *see also, Navarro v. Fuji Heavy Industries, Inc.*, 117 F. 3d 1027, 1031-32 (7th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 600, 139 L. Ed. 2d 488 (1997) (*Daubert* criteria apply to engineering expert testimony); *Roback v. V.I.P. Transportation, Inc.*, 90 F. 3d 1207, 1214-16 (7th Cir. 1996) (*Daubert* applied to engineer who used a computerized data acquisition system to reconstruct accident); *Deimer v. Cincinnati Sub-Zero Products, Inc.*, 528 F. 3d 341, 343-45 (7th Cir. 1995) (*Daubert* properly considered in excluding expert testimony about negligent product design); *cf., People Who Care v. Rockford Board of Education*, 111 F. 3d 58, 534 (7th Cir. 1997) ("the guidelines for the admissibility of expert testimony laid down in *Daubert* . . . apply to the testimony of social scientists as well as to that of natural scientists").

Eighth Circuit:

In *Peitzmeier v. Hennessy Industries, Inc.*, 97 F. 3d 293, 297 (8th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 155, 137 L. Ed. 2d 701 (1997), the Eighth Circuit held the district court did not err in considering the *Daubert* factors in excluding the testimony of plaintiffs' engineering expert. The court rejected the argument that *Daubert* should not apply because the expert's testimony was based on basic engineering principles rather than novel scientific techniques. *Id.* at 297; *see also, Pestel v. Vermeer Mfg. Co.*, 64 F. 3d 382, 384 (8th Cir. 1995) (applying *Daubert* to testimony of mechanical engineer); *Tenbarge v. Ames Taping Tool Systems, Inc.*, 18 F. 3d 656, 659 n. 4 (8th Cir. 1997) (noting split among the circuits on issue of whether *Daubert* applies to engineering testimony); *Dancy v. Hyster Co.*, 127 F. 3d 649, 652 (8th Cir. 1997), *cert. denied*, 1998 W L 97366, 66 U.S.L.W. 3459 (1998) (following *Peitzmeier* in affirming the district court's application of *Daubert* factors to a mechanical engineer); *cf., Penney v. Praxair, Inc.*, 116 F. 3d 330, 333 (8th Cir. 1997) (applying *Daubert* to PET scan); *Wood v. Minnesota Mining and Mfg. Co.*, 112 F. 3d 306, 310 (8th Cir. 1997) (not error under *Daubert* to allow highway safety specialist to testify about whether railroad crossing was reasonably safe).

Fifth Circuit:

In *Watkins v. Telsmith, Inc.*, 121 F. 3d 984, 990 (5th Cir. 1997), the Fifth Circuit followed *Peitzmeier* and *Cummins* by holding "that the *Daubert* analysis applies to the type of expert testimony presented by [plaintiffs' civil engineering expert]." The court considered, but rejected, the *Compton* court's view that *Daubert* only applies when

"unique, untested, or controversial methodologies or techniques" are relied on by the expert. *Id.* at 991; *see also, Guillory v. Domtar Industries, Inc.*, 95 F. 3d 1320, 1330-31 (5th Cir. 1996) (trial court properly excluded mechanical engineer's testimony pursuant to *Daubert*); *United States v. 14.388 Acres of Land*, 80 F. 3d 1074, 1078-79 (5th Cir. 1996) (applying *Daubert* to civil engineer's and appraisal expert's testimony and concluding *Daubert* did not bar their testimony); *cf., Marcel v. Placid Oil Co.*, 11 F. 3d 563, 567-68 (5th Cir. 1994) (applying *Daubert* to exclude testimony of expert economist).

Third Circuit:

The court has held it was not error for the district court to exclude an electromechanical engineer's testimony pursuant to *Daubert*. *Surace v. Caterpillar, Inc.* 111 F. 3d 1039, 1055-556 (3d Cir. 1997). Similarly, the Third Circuit has sanctioned application of *Daubert* to bar testimony by an accident-reconstruction expert. *Habecker v. Clark Equipment Co.*, 36 F. 3d 278, 290 (3d Cir. 1994), *cert. denied*, 514 U.S. 1003 (1995); *cf., United States v. Velasquez*, 64 F. 3d 844, 850 (3d Cir. 1995) (*Daubert* applies to handwriting expert's testimony); *see generally, In re Paoli R. R. Yard PCB Litigation*, 35 F. 3d 717 (3d Cir. 1994), *cert. denied, General Electric Co. v. Ingram*, 513 U.S. 1190 (1995) (interpreting *Daubert* and setting out factors to be considered in determining admissibility of scientific evidence).[6]

[6] It does not appear that either the First Circuit or the District of Columbia Circuit have had occasion to determine if *Daubert* applies to expert engineers. In *Bogosian v. Mercedes-Benz of North America, Inc.*, 104 F. 3d 472, 479 (1st Cir. 1997), the court held that a technical expert, who had training in industrial and vocational education, had obtained a bachelor or science degree, but did not have an engineering degree, was not able to testify concerning the appropriate design of a gear-selector lever. The court stated:

> Bogosian contends that the court committed reversible error because it wrongly characterized the subject of [the expert's] testimony as "scientific" rather than "technical" and thus, *Daubert* was inapplicable. Assuming *arguendo* that this case does not involve "scientific law" (and thus *Daubert*'s holding does not apply), we must then consider *Daubert*'s countervailing precept: that the trial judge has 'the task of insuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.' " *Vadala* [*v. Teledyne Industries, Inc.*, 44 F. 3d 36 (1st Cir. 1995)] (quoting *Daubert*, 509 U. S. at 597, 113 S. Ct. at 2795-96).

Id.

The court determined that the expert's procedures in investigating his theory were lacking and that his conclusion derived from those procedures was not reliable, stating: "While the district may have inartfully cited *Daubert* in making its ruling, we cannot say that it abused its substantial discretion when finding inadequate the premises of the proposed testimony." *Id.*; *but cf., Ed Peters Jewelry Co., Inc. v. C&J Jewelry Co., Inc.*, 124 F. 3d 252, 258-261 (1st Cir. 1997) (applying a *Daubert* analysis to testimony by a certified public accountant concerning valuation of assets). The First Circuit has not explicitly held *Daubert* inapplicable to expert engineering testimony and it is unclear from its ruling in *Ed Peters Jewelry* and its dicta in *Bogosian* what it will decide when faced with the issue.

The District of Columbia Circuit has not yet faced a situation remotely similar to that presented by this case. The closest decision to the issues presented here is *Ambrosini v.*

C. The Better View Is That *Daubert* Applies To Expert Engineers.

As this Court made clear in its *Daubert* decision, the requirements of Fed. R. Evid. 702 do not apply "specially or exclusively" to unconventional evidence such as novel scientific techniques. 509 U.S. at 593, n. 11; *see also*, 509 U.S. at 590. The application of *Daubert* to engineering experts comports with this Court's instruction and Fed. R. Evid. 702's requirements and is the better-reasoned approach for several reasons.

First, application of *Daubert* to engineering experts will foster the resolution of products liability and other cases based on reliable expert testimony. The approach taken by the Eleventh Circuit in this case provides the wrong signal and will move the quality of expert evidence in the wrong direction. If there is an easier admissibility standard for less qualified experts, then lawyers are invited to use less qualified experts in order to avoid analysis of these experts' proposed testimony under the *Daubert* criteria. As stated by the Fifth Circuit in rejecting *Compton*:

> It seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape

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Labarraque, 101 F. 3d 129, 137-141 (D.C. Cir. 1996), *cert. dismissed, Upjohn Co. v. Ambrosini*, ___ U.S. ___, 117 S. Ct. 1572, 137 L. Ed. 2d 716 (1997), in which the court held that the district court had erred in excluding testimony of an epidemiologist and teratologist concerning the cause of plaintiff's injuries. It subjected these experts' testimony to a *Daubert*-based analysis and found their testimony sufficiently reliable to be submitted to the jury. *Id.*

> screening by the district court simply by stating that their conclusions were not reached by any particular method or technique. The moral of this approach would be, the less factual support for an expert's opinion, the better.

Watkins, supra, 121 F. 3d at 991.

The opinions allowing an expert to escape *Daubert* scrutiny if he does not follow a particular method or technique create a huge loophole to the trial court's ability to keep out unreliable expert testimony. "The less support an expert offers in the form of a particular method or technique, the less chance that *Daubert* will apply. And without *Daubert*'s scrutiny for reliability, all an expert has to show is proper qualifications." Note, "Inconsistent Gatekeeping in Federal Court: Application of *Daubert v. Merrill Dow Pharmaceuticals, Inc.* To Non-Scientific Expert Testimony," 30 Loy. L.A. L. Rev. 1379, 1410 (1997); *see also, Braun v. Lorillard, Inc.*, 84 F. 3d 230, 235 (7th Cir. 1996) (discussing danger of relying on credentials alone in admitting expert testimony); *Minasian v. Standard Chartered Bank*, 109 F. 3d 1212, 1216 (7th Cir. 1997) ("how vital it is that judges not be deceived by the assertions of experts who offer credentials rather than analysis"); *Tyus v. Urban Search Management*, 102 F. 3d 256, 263 (7th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 2409, L. Ed. 2d 175 (1997) ("the district court must ensure it is dealing with an expert, not just a hired gun.")

In addition, applying *Daubert* to expert engineers recognizes that they testify based on the *application* of scientific principles of chemistry, physics, mechanics, electricity and other disciplines. Engineering theories are not analytically different from the scientific concepts this Court examined in *Daubert*. It is illogical to apply *Daubert*

to testimony of a chemist, but not to that of a chemical engineer. A district judge, therefore, may appropriately consider engineering experts' testimony under the four *Daubert* factors and other relevant criteria to determine if Rule 702's minimum reliability requirements are satisfied.

To hold that it is reversible error for a trial judge to consider the *Daubert* factors in evaluating the reliability of engineering expert testimony, as did the Eleventh Circuit, creates another preliminary battleground in every case involving an engineering expert. This skirmish would involve whether the engineering expert's testimony is "scientific" or, rather, "technically" or "experientially" based so as to avoid analysis under the *Daubert* criteria. Because, as found by the District Court here, all engineering experts rely on science – or, at least, in order to bolster their credibility, can be expected to adorn their testimony "in the dress of scientific or technical expertise," *Cook, supra*, 53 F. 3d at 739 – it is appropriate for trial judges to review their testimony under the *Daubert* factors.

While the adversarial system, including vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, may be an appropriate and effective means of pointing out deficiencies in some expert testimony, letting the case go to the jury in the hope that the system will "take care" of evidence that should not have been admitted in the first place is also "exactly backwards." *Watkins, supra*, 121 F. 3d at 991. Such an approach ignores Fed. R. Evid. 104(a)'s requirement that preliminary admissibility questions are to be resolved by the trial judge and results in the trial court's abdication of its gatekeeper duties which this

Court has said are applicable to all expert testimony. *Daubert, supra*, 509 U. S. at 592, n. 11 and 597. Even if cross-examination and presentation of contrary evidence are successful in pointing out problems with the expert's testimony, the predictable result in many technical cases is confusion of the jury, which does not understand the underlying bases for the competing expert opinions, but only comprehends that there has been a disagreement. *See, e.g., Guillory, supra*, 95 F. 3d at 1331 ("[n]ormally, the truth regarding models and demonstrations surfaces with vigorous cross-examination; however, where technical information is involved, it is easier for the jury to get lost in the labyrinth of concepts. . . . The jury, frantically grasping at complex . . . concepts, could easily miss subtle distinctions revealed on cross-examination and then drown in the untrue and the unproven"); *see also*, R. Nahas, Comment, "*Daubert v. Merrill Dow Pharmaceuticals, Inc.*; Requiem for Frye: The Supreme Court Lays to Rest the Common Law Standard for Admitting Scientific Evidence in Federal Courts," 29 New Eng. L. Rev. 93, 107 (1994).

In sum, the better-reasoned approach is that expert engineers' testimony should be subject to analysis under the *Daubert* factors. To hold that *Daubert* does not apply to engineering principles and concepts is an overly restrictive reading of this Court's *Daubert* opinion. Moreover, such an approach, as adopted by the Eleventh Circuit in this case, would result in the submission of lower quality evidence to the jury and a preliminary skirmish in every case involving whether expert engineering testimony is "scientific." The preferred analysis is what the District Court judge did in this case: Apply the *Daubert*

factors and review any other relevant factors and evidence presented by the parties and determine if the expert's proffered testimony meets the threshold reliability requirements of Fed. R. Evid. 702.

II. THE DECISION MISAPPLIES THIS COURT'S RECENT *JOINER* OPINION

In *Joiner, supra,* this Court concluded that "abuse of discretion is the appropriate standard" an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert*. 522 U.S. at ___, 139 L. Ed. 2d at 514. While the Court of Appeals provided lip service to this Court's *Joiner* opinion, by citing it as applicable to review of the trial court's decision to exclude particular evidence under *Daubert*, App. 5a., the Court of Appeals misapplied the abuse of discretion standard in this case. This is apparent because, without any discussion or analysis, the Eleventh Circuit rejected the District Court's factual finding that "Carlson's method is necessarily grounded in some scientific foundation." App. 18b. To the contrary, the Eleventh Circuit stated: "It seems apparent to us that Carlson's testimony is non-scientific." App. 5a.

The Eleventh Circuit's misapplication of this Court's *Joiner* decision affords another compelling reason for granting review.

III. THE ISSUE IS IMPORTANT.

Chief Justice Rehnquist, in his separate opinion in *Daubert*, recognized the importance of this area of the

law. 509 U.S. at 601. It is important for all of the reasons that led this Court to review *Daubert* and, more recently, *Joiner*. The decision whether to exclude expert testimony is often case-determinative. This case provides a perfect example.

This case, moreover, presents a logical next step for the Court in providing guidance to the lower federal courts concerning their role in assessing proffers of expert testimony under Rules 104 and 702 of the Federal Rules of Evidence. In *Daubert*, the Court considered "novel scientific" testimony. Next, in *Joiner*, it determined the appropriate standard of review for the courts of appeals in considering *Daubert* rulings. This case presents an issue not yet determined but calling for an answer: whether the *Daubert* factors are properly applied to assess reliability of testimony by an expert engineer. The time for the Court to answer this important question has arrived.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Patrick CARMICHAEL, Sr., an individual, father and next of kin to Patrick Carmichael, Jr., a minor; Luzviminda Carmichael, an individual, mother and next friend of Carina Horn, a minor and administratrix of estates of Janice Horn; Carina Horn, a minor; Leona Carmichael, Shameela Carmichael, Natimah Carmichael, Plaintiffs-Appellants,

v.

SAMYANG TIRE, INC.; Hercules Tire Company; Kuhmo, U.S.A.; Kumho & Company, Inc., Defendants-Appellees,

Cooper Rubber and Tire Company, Ford Motor Company, Defendants.

No. 96-6650.

United States Court of Appeals,
Eleventh Circuit.

Dec. 23, 1997.

Appeal from the United States District Court for the Southern District of Alabama.

Before BIRCH and CARNES, Circuit Judges, and PROPST*, Senior District Judge.

BIRCH, Circuit Judge:

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* Honorable Robert B. Propst, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

In this appeal, we determine whether the Supreme Court's *Daubert*[1] criteria for admission of scientific evidence should apply to testimony from a tire failure expert. In granting summary judgment against plaintiff-appellants, the district court relied on *Daubert* to exclude testimony from plaintiff-appellants' expert. Plaintiff-appellants, however, argue that the district court should not have applied *Daubert* because their expert's proffered testimony is not "scientific." We REVERSE.

I. BACKGROUND

On July 6, 1993, plaintiff-appellants, eight members of the Carmichael family (collectively "the Carmichaels"), were involved in a serious automobile mishap when the right rear tire on their minivan failed. This occurrence resulted in significant trauma to each of the Carmichaels; one member of the family ultimately died from her injuries. For the purposes of this appeal, the parties agree that the failure of a tire manufactured and sold by defendant-appellees (collectively "Samyang") directly caused the mishap.

Following the incident, the Carmichaels submitted the carcass of the failed tire to George Edwards, a purported expert on tire failure. After examining the tire, Edwards determined that its failure was not the result of any abuse by the Carmichaels. Therefore, Edwards concluded that a defect in either the tire's design or its manufacture caused the blowout. Before Edwards could

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[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

be deposed by Samyang, however, he became too ill to testify and transferred the case to his employee, Dennis Carlson.[2] After reviewing Edwards's file on the tire and discussing the case with Edwards, Carlson confirmed Edwards's conclusion that a design or manufacturing defect caused the blowout. Carlson, though, did not personally examine the tire until approximately one hour before his deposition by Samyang, long after he had rendered his opinion on the cause of the blowout. In his deposition, Carlson then set forth both his analytical process and his conclusion that the Carmichaels' tire was defective.

Before the district court, Samyang moved for the exclusion of Carlson's testimony on the ground that it could not satisfy *Daubert's* standards for reliability of scientific evidence. After reviewing Carlson's deposition, the district court agreed and excluded Carlson, writing that "none of the four admissibility criteria outlined by the *Daubert* court are satisfied in this case." *Carmichael*,

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[2] Carlson holds a bachelor's and a master's degree in mechanical engineering from the Georgia Institute of Technology. Carlson worked from 1977 to 1987 as a research engineer for Michelin Americas Research & Development, where he was involved for the majority of his tenure in tire testing. Following that experience, Carlson became a senior project engineer at S.E.A., Inc., where he served from 1987 to 1994 as a tire failure consultant before becoming an employee of George R. Edwards, Inc. The District Court assumed for the purpose of its *Daubert* analysis that Carlson is qualified to testify as an expert in tire failure analysis. *See Carmichael v. Samyang Tires, Inc.*, 923 F.Supp. 1514, 1518-19 (S.D.Ala.1996). We, like the district court, assume that Carlson is an expert for the purposes of this appeal.

923 F.Supp. at 1521. Because the Carmichaels' only proffered evidence of a tire defect was Carlson's testimony, the district court then granted summary judgment for Samyang. *See id.* at 1524. The Carmichaels now appeal the exclusion of their tire expert.

II. DISCUSSION

In *Daubert*, the Supreme Court established several general criteria for the admission of scientific expert testimony under Federal Rule of Evidence 702.[3] *See Daubert*, 509 U.S. at 593-95, 113 S.Ct. at 2796-98.[4] Appealing the district court's exclusion of Carlson's testimony, the Carmichaels argue that the district court should not have applied *Daubert's* reliability framework because Carlson is not a "scientific" expert. In response, Samyang contends that Carlson's testimony is based on an unreliable

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[3] Rule 702 provides that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[4] The Court suggested four primary inquiries for determining the reliability of a scientific theory or technique: (1) whether it has been tested; (2) whether it has been subject to peer review and publication; (3) its known or potential rate of error; and (4) whether it is generally accepted by the relevant scientific community. However, the Court emphasized that "[t]he inquiry envisioned by Rule 702 is . . . a flexible one. Its overarching subject is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission." *Daubert*, 509 U.S. at 594-95, 113 S.Ct. at 2797.

scientific analysis. We review the district court's legal decision to apply *Daubert de novo*, *see Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1517 (10th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 611, 136 L.Ed.2d 536 (1996), and its decision to exclude particular evidence under *Daubert* for abuse of discretion, *see General Elec. Co. v. Joiner*, ___ U.S. ___, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

Despite Samyang's protestations, "Daubert does not create a special analysis for answering questions about the admissibility of all expert testimony. Instead, it provides a method for evaluating the reliability of witnesses who claim scientific expertise." *United States v. Sinclair*, 74 F.3d 753, 757 (7th Cir.1996). In fact, the Supreme Court in *Daubert* explicitly limited its holding to cover only the "scientific context." *Daubert*, 509 U.S. at 590 n. 8, 113 S.Ct. at 2795 n. 8; *see also United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir.1997) ("*Daubert* applies only to the admission of scientific testimony."); *Compton*, 82 F.3d at 1518 (same); *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir.1994) (same).[5] Although the Court's analysis in *Daubert* may suggest reliability issues for district courts

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[5] Samyang's citations to *United States v. Lee*, 25 F.3d 997, 999 (11th Cir.1994) (per curiam), for the contrary position are inapposite. In *Lee*, we examined whether a district court should apply *Daubert's* reliability factors to evidence produced by machines. *Id.* at 998. Because the results produced by the machines were "only admissible through the testimony of an expert witness," and because "courts do not distinguish between the standards controlling admission of evidence from experts and evidence from machines," we remanded for reconsideration in light of *Daubert*. *Id.* at 998-99. Nowhere in *Lee* did we imply that *Daubert* applied to non-scientific expert testimony.

to consider as they determine whether proffered evidence is sufficiently reliable for admission under Rule 702, "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system: 'Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' " *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir.1996) (quoting *Daubert*, 509 U.S. at 596, 113 S.Ct. at 2798).

What, then, is the difference between scientific and non-scientific expert testimony? In short, a scientific expert is an expert who relies on the application of scientific principles, rather than on skill- or experience-based observation, for the basis of his opinion. *See Daubert*, 509 U.S. at 590, 113 S.Ct. at 2795. As the Sixth Circuit explained in *Berry v. City of Detroit*:

> The distinction between scientific and non-scientific expert testimony is a critical one. By way of illustration, if one wanted to explain to a jury how a bumblebee is able to fly, an aeronautical engineer might be a helpful witness. Since flight principles have some universality, the expert could apply general principles to the case of the bumblebee. Conceivably, even if he had never seen a bumblebee, he still would be qualified to testify, as long as he was familiar with its component parts.
>
> On the other hand, if one wanted to prove that bumblebees always take off into the wind, a beekeeper with no scientific training at all would be an acceptable witness if a proper foundation were laid for his conclusions. The foundation would not relate to his formal training, but to his firsthand observations. In other words, the beekeeper does not know any more about flight principles than the jurors, but he has seen a lot more bumblebees than they have.

25 F.3d 1342, 1349-50 (6th Cir.1994); *see also Sorenson v. Robert B. Miller & Assoc., Inc.*, Nos. 95-5085, 95-5086, 1996 WL 515351, (applying Berry).[6] Thus, the question in this case is whether Carlson's testimony is based on his application of scientific principles or theories (which we should submit to a *Daubert* analysis) or on his utilization of personal experience and skill with failed tires (which we would usually expect a district court to allow a jury to evaluate). In other words, is the testimony at issue in this case more like that of a beekeeper applying his experience with bees or that of an aeronautical engineer applying his more generalized knowledge of the scientific principles of flight?

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[6] An analogy closer to the facts of this case would be the example of an auto mechanic and a burned-out spark plug discussed at oral argument. Given a proper foundation, a mechanic with years of experience with spark plugs might be able to identify for a jury burns or other marks on a spark plug that he believes disclose whether the plug burned out because of normal wear or some defect; an experienced mechanic may recognize patterns of normal and abnormal wear on an auto part even though he has no knowledge of the general principles of physics or chemistry that might explain why or how a spark plug works. Such a mechanic's testimony would be non-scientific, while the testimony of another expert on the nature and effects of combustion (applied to spark plugs) would be scientific.

Having clarified the question posed by this case, it seems apparent to us that Carlson's testimony is non-scientific. Although Samyang is no doubt correct that the laws of physics and chemistry are implicated in the failure of the Carmichaels' tire, Carlson makes no pretense of basing his opinion on any scientific theory of physics or chemistry.[7] Instead, Carlson rests his opinion on his experience in analyzing failed tires. After years of looking at the mangled carcasses of blown-out tires, Carlson claims that he can identify telltale markings revealing whether a tire failed because of abuse or defect.[8] Like a beekeeper who claims to have learned through years of observation that his charges always take flight into the wind, Carlson maintains that his experiences in analyzing tires have taught him what "bead grooves" and "sidewall deterioration" indicate as to the cause of a tire's failure. Indeed, Carlson asserts no knowledge of the physics or chemistry that might explain why the Carmichaels' tire failed. Thus, we conclude that Carlson's testimony falls outside the scope of *Daubert* and that the district court erred as a matter of law by applying *Daubert* in this case.

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[7] If Carlson or the Carmichaels' counsel were to assert or imply a "scientific" basis for Carlson's testimony at trial, after representing to the district court and to this court that Carlson's opinions are "non-scientific," then we are confident that the district court will be able to take appropriate remedial measures.

[8] We note that both Carlson's and Samyang's experts rely on the same markings on the Carmichaels' tire for their analyses; the existence and relevance of these signs has not been questioned by either party before this court.

Still, the inapplicability of *Daubert* should not end the day regarding Carlson's reliability. Under Rule 702, it is the district court's duty to determine if Carlson's testimony is sufficiently reliable and relevant to assist a jury. *See 14.38 Acres*, 80 F.3d at 1078. Moreover, Carlson's testimony is subject to exclusion under Federal Rule of Evidence 403 if its probative value is substantially outweighed by its likely prejudicial effect.[9] Aside from its *Daubert* related arguments, Samyang has presented this court with a number of potentially troubling criticisms of Carlson's alleged expertise and methodology, including his rendering of an opinion regarding the Carmichaels' tire before he had personally inspected its carcass.[10] We leave judgments about such matters to the discretion of the district court on remand.

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[9] After analyzing Carlson's proffered testimony under *Daubert*, the district court concluded that "Carlson's testimony is simply too unreliable, too speculative, and too attenuated to the scientific knowledge on which it is based to be of material assistance to the trier of fact. . . . " *See Carmichael*, 923 F.Supp. at 1522. Even without requiring Carlson's testimony to satisfy the *Daubert* criteria on remand, the district court still may find that, under all the circumstances, Carlson's testimony is so unreliable as to be unhelpful to a jury. We do not intend our comments regarding Carlson's testimony or qualifications to constrain the district court's discretion to admit or exclude his testimony under the proper Rule 702 or Rule 403 standards.

[10] We note that many of Samyang's criticisms of Carlson may also apply to the qualification of Samyang's own tire failure expert. However, we leave such issues for the district court to consider on remand.

III. CONCLUSION

The district court erred as a matter of law in applying the *Daubert* criteria to the Carmichaels' proffered expert testimony. Therefore, we REVERSE and REMAND the case to the district court for further proceedings consistent with this opinion.

APPENDIX B

Patrick CARMICHAEL, et al., Plaintiffs,

v.

SAMYANG TIRES, INC., et al., Defendants.

Civil No. 93-0860-CB-S.

United States District Court,
S.D. Alabama,
Southern Division.

April 1, 1996.

Richard H. Taylor, Steven A. Martino, Sidney W. Jackson, III, Steven A. Martino, Mobile, AL, for plaintiffs.

C. Richard Wilkins, Mobile, AL, for Carina Horn.

Warren C. Herlong, Jr., Joseph P.H. Babington, Mobile, AL, for defendants.

Steven A. Martino, Liason Counsel for the Plaintiffs, Jackson, Taylor & Martino, Mobile, AL, for Leona Carmichael, Shameela Carmichael, Natimah Carmichael.

ORDER

BUTLER, Chief Judge.

This matter is before the Court on a motion for summary judgment filed by all defendants (tab 117); motion for summary judgment filed by defendants Kumho U.S.A., Inc. ("Kumho U.S.A.") and Hercules Tire & Rubber Co., Inc. ("Hercules") (tab 115); and motion of all defendants to exclude testimony of plaintiff's expert Dennis Carlson (tab 119). After careful consideration of the issues raised by the parties in their briefs, the Court finds that the defendants' motion for summary judgment is due to be **GRANTED.**

I. Factual Background

The underlying facts of this products liability action are largely undisputed by the parties. On July 6, 1993, a 1988 Ford Aerostar XL minivan owned and driven by plaintiff Patrick J. Carmichael was involved in a single-vehicle accident while traveling southbound on Interstate 65 in Baldwin County, Alabama. The accident occurred when the right rear tire of the van failed, after which the driver lost control of the vehicle. The van overturned, and six of the eight occupants were ejected from the van. Plaintiffs Patrick Carmichael, Luzviminda Carmichael, Carina Horn, Patrick Carmichael, Jr., Leona Carmichael, Shameela Carmichael, and Natimah Carmichael all suffered injuries as a result of the accident. Janice Horn, the daughter of plaintiff Luzviminda Carmichael, died as a result of her injuries.[1]

This lawsuit revolves around the history of the Carmichaels' minivan and, more precisely, of the right rear tire which was on the minivan at the time of the accident. On April 30, 1993, plaintiff Patrick Carmichael purchased

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[1] There is a dispute as to whether the plaintiffs were wearing seatbelts at the time of the accident, and whether the wearing of seatbelts would have prevented the accident. Additionally, the parties disagree as to whether Patrick Carmichael's reaction to the blowout contributed to the accident, and whether there are actions he could have taken which would have prevented the accident. The speed of the minivan prior to the accident and the causal relationship, if any, between that speed and the plaintiffs' injuries are likewise matters on which the parties advance conflicting positions. For the purposes of this summary judgment motion, these factual disagreements are resolved in the light most favorable to the plaintiffs.

the minivan "as is" from a Dodge dealership in Washington state. At the time of the sale, the van's odometer registered 88,997 miles. The right rear tire on the van at the time of Carmichael's purchase was a Hercules Superior XII Steel Belted Radial, the same tire that failed two months and 7,011 miles later.[2] This tire was designed and manufactured by defendant Kumho & Company ("Kumho") and was produced in the Republic of South Korea in the sixth week of 1988.[3] Though the service history of the tire is unknown, a plaintiffs' witness has stated his opinion that the tire had been driven for thousands of miles prior to failure. The witness further testified that the remaining tread depth on the tire at the time of the accident varied from 0/32" to 3/32", down from an original depth of 10/32" to 11/32". Additionally, the tire had been punctured by a nail or screw at some point during its service life, and the plaintiffs' witness testified that the exterior holes caused by the puncture had not been adequately filled.

The tire was stamped with the name "Hercules" before it left the factory in South Korea. It is undisputed

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[2] The parties' discovery efforts have been unsuccessful in determining when or where this tire was purchased and mounted on the van. Carmichael has testified that the tire was on the van when he bought it, and that he did not replace it prior to the accident; however, it is unclear how long the tire had been on the van or how many miles the tire had traveled before Carmichael acquired the van.

[3] In 1984, defendant Samyang Tires, Inc. ("Samyang") was merged into Kumho. Defendant Kumho was the surviving corporation; thus, Samyang is not an independent corporate entity and is not a separate party to this lawsuit.

that defendant Hercules Tire & Rubber Company, Inc. ("Hercules") did not manufacture or design the tire, although it did retain the right to approve the aesthetics of the lettering, markings, and tread on the tire. Hercules is in the business of buying and distributing tires produced by others. Defendant Kumho U.S.A., Inc. ("Kumho U.S.A."), a separate entity from Kumho, did not participate in either the manufacture or the design of the tire at issue. Kumho U.S.A. is in the business of distributing Kumho's products in the United States. Prior to 1990, Kumho shipped the Hercules tires it produced to one of three recipients: (1) to Kumho U.S.A.; (2) to Hercules; or (3) directly to the customer who was purchasing the tires. The plaintiffs have been able to produce no evidence as to which distribution route was used with respect to the particular tire at issue in this case; hence, there is no evidence that defendants Hercules and Kumho U.S.A. ever handled or sold this tire.

On October 20, 1993, the plaintiffs filed the instant lawsuit in this Court, sitting in diversity jurisdiction. As amended, the complaint sets forth causes of action against the defendants under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), negligence/wantonness, and breach of warranty. Plaintiffs have retained one expert witness, Dennis Carlson ("Carlson"), to testify as to the presence of a manufacturing or design defect in the right rear tire of the minivan. The defendants have filed two summary judgment motions, as well as a motion to exclude Carlson's testimony under Rule 702 of the Federal Rules of Evidence. The Court has determined that these motions are ripe for disposition,

and that no evidentiary hearings or other proceedings are necessary at this time.

II. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir.1987). A party is entitled to judgment as a matter of law unless the nonmovant demonstrates that a genuine dispute exists as to an element of his case on which he has the burden of proof. *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552; *Everett*, 833 F.2d at 1510. A failure by the opposing party to point out disputed facts will be taken as an admission that no material factual dispute exists. Local Rule 8. The function of the court is not to "weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Summary judgment is improper "if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248, 106 S.Ct. at 2510. If a reasonable factfinder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant

summary judgment. *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir.1988). All factual matters are to be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Barnes v. Southwest Forest Industries, Inc.*, 814 F.2d 607, 609 (11th Cir.1987).

III. Legal Analysis

A. Plaintiffs' Claims Under AEMLD

1. Standard and Burdens of Proof

The plaintiffs allege that the Hercules Superior XII tire on the right rear of the van failed because of a manufacturing or design defect. This theory of liability is embodied in the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"). Under Alabama law, in order to prevail on an AEMLD claim, a plaintiff must show the following:

> "(1) [H]e suffered injury or damages to himself or his property by one who sells a product in a defective condition unreasonably dangerous to the plaintiff as the ultimate user or consumer, if
>
> (a) the seller is in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> "(2) Showing these elements, the plaintiff has proved a prima facie case although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and

> (b) the user or consumer has not bought the product from, or entered into any contractual relation with, the seller."
>
> *Casrell v. Altec Industries, Inc.*, 335 So.2d 128, 132-33 (Ala.1976).

Thus, the AEMLD imposes upon a manufacturer the duty to design and manufacture a product that is reasonably safe for its intended use. *See Townsend v. General Motors Corp.*, 642 So.2d 411, 415 (Ala.1994). However, "[p]roof of an accident or injury is not in itself sufficient to establish liability under the AEMLD; a defect in the product must be affirmatively shown." *Id.; see also Brooks v. Colonial Chevrolet-Buick, Inc.*, 579 So.2d 1328, 1333 (Ala.1991). Ordinarily, expert testimony will be required to prove the existence of a defect in AEMLD cases because of the complex and technical nature of such proof. *See Sears, Roebuck & Co., Inc. v. Haven Hills Farm, Inc.*, 395 So.2d 991, 995 (Ala.1981).

2. Carlson's Testimony

The plaintiffs have presented the testimony of a single witness, Dennis Carlson ("Carlson"), in support of their claim that the tire failure was caused by a manufacturing or design defect. Plaintiffs have offered Carlson as an expert witness, pursuant to Rule 702 of the Federal Rules of Evidence. Carlson is a mechanical engineer employed as a tire consultant by George R. Edwards and Associates, Inc. He has earned a masters degree in mechanical engineering, and has worked as a consultant in the area of tire failure on a number of cases. Additionally, he worked for Michelin America for ten years in

the field of tire design. The defendants challenge Carlson's qualifications to testify on the subject of tire failure and request an opportunity to explore his competency to offer an opinion on the causes of tire failure at a *Daubert*-type evidentiary hearing pursuant to Rule 104(a) of the Federal Rules of Evidence. However, the Court need not rest its ruling on a determination of Carlson's competence to offer an expert opinion on the causes of tire failure.[4] Therefore, the Court will not examine his qualifications in any greater depth at this time, and will assume (without deciding) for the purposes of this order that Carlson is qualified to offer expert testimony on this subject.

Carlson opines that the tire failed because of poor or insufficient adhesion between the rubber, steel, and nylon components of the tire. *See* Carlson Deposition ("Carlson Depo."), at 411. This insufficient adhesion, in turn, caused the tire components to separate from each other, resulting in the flapping of the tread and the sudden, catastrophic loss of air pressure in the tire. Carlson Depo., at 331. Loss of adhesion, according to Carlson, may be caused by either abuse or defect. Carlson Depo., at 243-244. The

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[4] Additionally, the Court notes that the parties have submitted some 520 pages of transcripts of deposition testimony provided by Carlson in this matter, as well as some 670 pages of transcripts of deposition testimony provided by him in another case. The Court has reviewed these documents in some detail, and has determined that no Rule 104(a) evidentiary hearing will be necessary as to the substance of Carlson's proposed trial testimony, the methodology used by Carlson, or the basis for his conclusion that the tire failed due to a manufacturing or design defect.

only form of abuse at issue in the present case is overdeflection, which may occur when a tire is underinflated, overloaded, or both.[5] Carlson Depo., at 217. In order to determine whether a defect has caused the tire failure, Carlson looks for the following signs of overdeflection: (1) greater tread wear on the shoulder than in the center of the tire; (2) sidewall deterioration or discoloration; (3) abnormal bead grooving on the tire; and (4) rim flange impressions. Carlson Depo., at 250-52, 390. When Carlson fails to find sufficient evidence of two of these four indicators in a tire, he rules out overdeflection as a cause of the tire failure and, barring other evidence of abuse, concludes that the loss of adhesion was prompted by a manufacturing or design defect. Carlson Depo., at 278-79. As Carlson testified, "when we look for the indicators of overloading or overdeflection, as I see, and eliminate those as a possible cause, then there is nothing else but a manufacturing defect." Carlson Depo., at 278.

With respect to the tire at issue in this case, Carlson examined it for the first time on the morning that his deposition was taken and performed no tests on any of the minivan's tires at that time.[6] Carlson Depo., at 328.

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[5] Overdeflection causes the tread of a tire to become too hot, causing deterioration in the sidewall, cords, and rim of the tire. Carlson Depo., at 219-221.

[6] This initial observation occurred after Carlson had issued his written report and conclusions regarding the cause of the blowout. The plaintiffs' original expert, George Edwards, had examined the tire previously and had taken photographs of the tire. Later, Carlson replaced Edwards as the plaintiffs' experts, reviewed Edwards' photographs, and adopted Edwards' report and conclusions almost verbatim as his own.

His analysis was limited to a visual inspection of the tire, though he conceded that such actions as cutting the tire could reveal additional pertinent information. Carlson Depo., at 381. Carlson indicated that the separation most likely began under a bald spot on the tire, where the tread was completely worn. Carlson Depo., at 488. In his examination of the tire, Carlson observed some evidence of uneven tread wear, sidewall deterioration, abnormal bead grooving, and rim flange impressions; however, he found that the evidence with respect to each factor was either insufficient to demonstrate overdeflection or that it was attributable to causes other than overdeflection. Carlson Depo., at 403-06, 445-46, 449-56. Based on this testimony, Carlson asserted that there was no evidence of overdeflection in the tire. Carlson Depo., at 462.

After ruling out overdeflection and other forms of abuse, Carlson concluded that the tire failure must have been precipitated by a manufacturing or design defect in the tire. However, neither the plaintiffs' written submissions nor the Court's review of Carlson's voluminous deposition transcripts indicate that Carlson identified any affirmative evidence of a defect in the tire. Stated differently, Carlson's expert opinion that the tire failure was caused by a manufacturing or design defect is founded on his determination that there is a paucity of evidence of overdeflection or other abuse, rather than by his ability to pinpoint any affirmative evidence of a defect.

3. Admissibility of Carlson's Testimony

The defendants' collective motion for summary judgment on the AEMLD claim is rooted in two separate

arguments: (1) Carlson's testimony is inadmissible; and (2) Carlson's testimony contains no evidence that the product failed because of a defective [sic] rather than because of abuse.[7] The Court believes that the first of these arguments provides an adequate basis for granting summary judgment in this case.

The defendants contend that Carlson's testimony is inadmissible as expert testimony under the standard articulated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The *Daubert* case expounded on Rule 702 of the Federal Rules of Evidence, which states that:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, Fed.R.Evid.

In particular, *Daubert* imposed on trial courts a sort of gatekeeper function in accordance with which they must "ensure that any and all scientific testimony or evidence

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[7] The Court rejects the defendants' argument that Carlson's testimony, if admissible, failed to make a prima facie showing that the tire was defective. Carlson's finding of a defect was prompted by his conclusion that insufficient signs of abuse were present, and his belief there can be no causes of tire separation other than abuse and defect. As Carlson colorfully put it in his deposition: "Well, besides nuclear war that's about all there is that causes tire failure." Carlson Depo., at 392. Despite defendants' exhortations to the contrary, the Court perceives no inherent flaw in a process-of-elimination form of proof per se, as long as the underlying methodology is scientifically valid.

admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589, 113 S.Ct. at 2795, 125 L.Ed.2d at 480. In assessing whether proffered scientific testimony is admissible, a court must consider such factors as: (1) whether the technique or theory used may be tested or refuted; (2) whether the technique or theory has been a subject of peer review or publication; (3) the known or potential rate of error of a technique; and (4) the degree of acceptance of a theory or technique within the relevant scientific community. *Id.* at 589-95, 113 S.Ct. at 2795-97, 125 L.Ed.2d at 482-83. In so doing, the trial court is reminded that "the overarching subject [of a *Daubert* analysis] is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission." *Id.* at 594-95, 113 S.Ct. at 2797, 125 L.Ed.2d at 484.

Regarding the first *Daubert* factor, it appears that Carlson's method for analyzing the tire is not susceptible to testing or falsification. Carlson admits that his work is "subjective" and that there is a certain degree of "uncertainty" in his conclusions.[8] *See* Carlson Depo., at 276-84.

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[8] At one point in Carlson's deposition, the following exchange took place:

"Q: And if you don't find the abuse factors or the evidence on the abuse factors is inconclusive, then what do you do?

A: Well, then it's probably a bad tire.

Q: Probably a bad tire?

A: Yes. And you got to look and see.

Q: I guess then it all comes down to the subjective opinion of whoever is doing the tire failure analysis as to whether those factors of abuse you've listed . . . exist in a given tire?

A: Well, it's subjective if you have the knowledge and experience to analyze those factors." Carlson Depo., at 402.

When questioned specifically, he could not identify any specific tests or other procedures which could be used to corroborate or refute the results of his visual inspection of the tire at issue.[9] Carlson Depo., at 276-78; 295- 96; 302, 387-88. Indeed, when asked specifically if there were any chemical tests which he could have applied to this tire, Carlson responded, "I don't think there are any that would apply to this case." Carlson Depo., at 388.

As to the second factor, Carlson concedes that there are no publications or papers which have approved or

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[9] Carlson does identify a number of tests which could be used to determine the adhesion of a particular tire. However, he states that he was unable to perform such tests on this tire for the following reasons:

"Q: Are there any tests of adhesion that you can use after a tire failure?

A: After a tire failure there are none that I would use.

Q: And why wouldn't you use them?

A: Well, I think that after a tire has been through an accident scenario or something like that that it gives you rather dubious results.

Q: It would be unreliable?

A: I would think they would be unreliable." Carlson Depo., at 295-96.

otherwise discussed his techniques for tire failure analysis.[10] He does identify a number of publications and research papers regarding tests which can be performed to assess the causes of abnormal tread wear and asserts that he relied on such papers in his testimony in this case. Carlson Depo., at 285. These papers do not back his techniques, however, as Carlson does not indicate that he actually performed any of the tests described in this literature on the tire in question; rather, he contends only that he is "probably" relying on the information provided in those documents as "background" for the work that he did. Carlson Depo., at 285, 287. Carlson was able to point to no other publications on which he relied in performing his analysis. Thus, it is evident from Carlson's testimony that there are no papers or publications which specifically address the propriety of the visual inspection method of analyzing failed tires which Carlson employed in this case.

The third *Daubert* factor concerns the known or potential error rate of the technique used. In this case, Carlson testified repeatedly that he did not know the potential error rate of his method for determining whether a given tire failure is the result of abuse or a defect. Carlson Depo. at 281, 284, 311, 474-75. Carlson

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[10] The relevant portion of Carlson's testimony is as follows:

"Q: So you arrive at a conclusion in your tire failure analysis by eliminating other causes?

A: Yes.

Q: Are there any publications that would discuss how you go about doing that sort of tire failure analysis?

A: I don't think so." Carlson Depo., at 303.

believes that differentiation between the two causes involves one's experience, and indicates that he has looked at many tires. Carlson Depo., at 281-84. However, he admits that he does not know whether his previous analyses of failed tires have been correct or incorrect; moreover, there is no evidence that he (or anyone else) has tested his methods in a controlled laboratory setting to gauge their accuracy in correctly distinguishing between overdeflected and defective tire separations. *Id.*

Finally, Carlson's methodology does not pass muster under the fourth prong of the *Daubert* analysis, either. The Court cannot conclude from the record before it that Carlson's analysis is generally accepted in the relevant scientific community. Indeed, the only evidence of general acceptance is Carlson's bare, unsupported statement that other tire experts have testified in depositions that methods similar to those used by Carlson are acceptable means of distinguishing between abused tires and defective tires in tire failure cases.[11] Though the plaintiffs

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[11] The relevant testimony from the deposition is as follows:

"Q: Are there any publications that would discuss how you go about doing that sort of tire failure analysis?

A: I don't think so.

Q: Are there any generally accepted theories on how you go about doing that sort of tire failure analysis?

A: I think this is a generally accepted theory is [sic] to eliminate all the other causes.

Q: And what do you base that statement on?

A: I've read many depositions from tire experts." Carlson Depo., at 303.

claim that the defense tire expert, Thomas Dodson, uses the same method of analysis as that employed by Carlson, the excerpted portions of Dodson's deposition provided by the plaintiffs lend no support to this contention. *See* Exhibit A to Plaintiffs' Opposition to Motion to Exclude Testimony of Dennis Carlson. There is simply no evidentiary basis upon which this Court could conclude that the relevant scientific community accepts a visual-inspection, process-of-elimination analysis of tire failure in the manner that it was performed by Carlson.

Thus, it appears that none of the four admissibility criteria outlined by the *Daubert* court are satisfied in this case. However, the plaintiffs respond by arguing that Carlson's testimony is a mere "technical analysis", rather than scientific evidence, and that such testimony is therefore exempted from *Daubert*-style scrutiny. In support of this argument, plaintiffs point out that Rule 702 of the Federal Rules of Evidence distinguishes between "scientific" and "technical" evidence, while the *Daubert* Court was concerned solely with the "admissibility of purportedly scientific evidence." *Daubert*, 509 U.S. at 589, 113 S.Ct. at 2795, 125 L.Ed.2d at 480.

This argument is meritless. While the Supreme Court's ruling in *Daubert* was specifically directed at the admissibility of certain scientific evidence, the plaintiffs have not directed the Court's attention to a single case in which a court has refused to apply *Daubert* to a "technical analysis". On the contrary, the *Daubert* standard has been routinely utilized by lower courts in assessing the admissibility of "technical analyses" similar to that at issue in the present case. *See, e.g., Strickland v. Royal Lubricant Co.*, 911 F.Supp. 1460 (M.D.Ala.1995) (using *Daubert* test to

assess admissibility of mechanical engineer testimony regarding faulty respirator); *Dickerson v. Cushman, Inc.*, 909 F.Supp. 1467, 1472 (M.D.Ala.1995) (mechanical engineer testimony regarding safe design of mobile tanks); *Bowers v. Northern Telecom, Inc.*, 905 F.Supp. 1004 (N.D.Fla.1995) (ergonomist testimony concerning computer keyboard design); *Byrnes v. Honda Motor Co., Ltd.*, 887 F.Supp. 279, 282 (S.D.Fla.1994) (testimony concerning proper safety equipment on motorcycle); *Williamson v. General Motors Corp.*, 1994 WL 660649, n4 (N.D.Ga., Sept. 30, 1994) (mechanical engineer testimony concerning engine drag theory of automobile accident). Thus, the distinction urged upon the Court by plaintiffs has not been recognized by the lower courts in this Circuit.

More to the point, the technical/scientific distinction has been impliedly rejected by the Eleventh Circuit. In *United States v. Lee*, 25 F.3d 997 (11th Cir.1994), the Eleventh Circuit remanded with instructions for the district court to consider whether the results of "specialized, technical diagnostic machinery" comported with *Daubert*. *Id.* at 998. In particular, the *Lee* court held that:

> "[C]ourts do not distinguish between the standards controlling admission of evidence from experts and evidence from machines. . . . *Daubert* applies not only to testimony about scientific concepts but also to testimony about the actual applications of those concepts." *Id.* at 988-99.

The plaintiffs may be correct that Carlson's testimony does not concern a scientific concept per se; however, it certainly is testimony about an application of scientific concepts involved in physics, chemistry, and mechanical

engineering. In other words, Carlson's method is necessarily grounded in some scientific foundation, and *Lee* requires this Court to consider the legitimacy of both the scientific foundation and the actual application of that foundation employed by Carlson. Accordingly, plaintiffs' efforts to recast Carlson's testimony in a "technical" light cannot succeed. The *Daubert* test clearly applies in this case, and plaintiffs' argument to the contrary is specious.

This Court's *Daubert* analysis illustrates that none of the criteria set forth by the Supreme Court for admissibility of scientific evidence under Rule 702 have been satisfied in this case. *See Clement v. Griffin*, 634 So.2d 412, 427 (La.App. 4 Cir.1994) (finding that expert testimony concerning defect in tire was inadmissible under *Daubert*). The *Daubert* Court assigned to trial courts "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597, 113 S.Ct. at 2799, 125 L.Ed.2d at 485. The Court has a responsibility to serve as a gatekeeper, ensuring that purportedly expert testimony does not reach a jury unless that testimony is reliable and reasonable. *See id.* As set forth in his deposition, Carlson's testimony is simply too unreliable, too speculative, and too attenuated to the scientific knowledge on which it is based to be of material assistance to the trier of fact; hence, it cannot be accorded the status of admissible expert testimony. Therefore, the Court **GRANTS** the defendants' motion to exclude the testimony of Dennis Carlson pursuant to the test articulated by the Supreme Court in *Daubert*.

4. Plaintiff's Evidence of a Defect

To maintain a claim under the AEMLD, a plaintiff cannot simply prove that an accident occurred and that he was injured; rather, "a defect in the product must be affirmatively shown." *Townsend v. General Motors Corp.*, 642 So.2d 411, 415 (Ala.1994). In the absence of Carlson's testimony, the plaintiffs have offered no evidence whatsoever that the right rear tire on the minivan was defective. Although they repeatedly recite the principle that proof of the specific defect which caused the product to fail is not required, *see Sears Roebuck & Co. v. Haven Hills Farm, Inc.*, 395 So.2d 991, 994 (Ala.1981), the plaintiffs have directed the Court to no other evidence that the tire suffered from any manufacturing or design defect at all. Alabama law is unambiguous that, while no proof of a specific defect which caused the product to fail is necessary, an AEMLD plaintiff must still offer some affirmative evidence of a defect in the product. *See Townsend*, 642 So.2d at 415. This the plaintiffs have not done; therefore, the Court has no choice but to **DISMISS** the plaintiffs' AEMLD claim against the defendants.

B. Plaintiffs' Remaining Claims

1. Negligence/Wantonness Claims

The exclusion of Carlson's testimony effectively bars the plaintiffs from proceeding with their negligence and wantonness causes of action against the defendants. The plaintiffs have offered no admissible evidence whatsoever from which a reasonable fact finder could conclude either that the defendants breached some duty of

care or that any such breach caused the injuries sustained by the plaintiffs; therefore, the negligence cause of action cannot stand against any of the defendants. Likewise, there is no evidence that any of the defendants acted with reckless indifference to consequences, or otherwise acted in a wanton manner with respect to the tire in question. Therefore, the plaintiffs' claims against defendants for negligent and wanton design, manufacture, distribution, marketing, and sale of the tire in question are due to be, and the same hereby are, **DISMISSED.**

2. Breach of Warranty Claims

The plaintiffs' breach of warranty theory of liability is something of a puzzle to the Court. Plaintiffs have never alleged that any of the defendants sold the tire directly to them, nor have they contested the fact that the minivan (including the tire which ultimately failed) was sold to them in used condition by a nonparty used car dealership on an "as is" basis. Given these facts, the Court does not see any factual or legal mechanism through which any of the defendants can be considered to have made any warranty to the plaintiffs. Certainly, there is no evidence that defendants ever sold the tire to the plaintiffs, so as to create an express or implied warranty by a seller to a buyer. Even if there were such a warranty, however, there is no evidence that the tire was not merchantable at the time of sale or that the tire was unfit for any purpose. In short, the Court fails to see how the undisputed facts of this case can possibly lend themselves to a cause of action against the tire manufacturers and distributors for breach of warranty. The parties' joint

pretrial order is of no assistance, either, as it lists as a triable issue only whether "any act or omission of any of the Defendants constitute[d] breach of warranty." *See* Joint Pretrial Order.

The plaintiffs' amorphous, unsupported breach of warranty claim cannot withstand summary judgment scrutiny. Rather, this claim seems to represent just the sort of "shotgun pleading" which recently prompted Chief Judge Tjoflat of the Eleventh Circuit to issue the following admonition:

> "Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice." *Anderson v. District Bd of Trustees of Central Fla. Community College*, 77 F.3d 364, 1996 WL 71087, *1 (11th Cir., Feb. 20, 1996).

Given the plaintiffs' failure to express their breach of warranty claim with any modicum of clarity in the pretrial order and their failure to respond in any manner to the defendants' motion for summary judgment as to that claim, the breach of warranty claim cannot proceed any further in this litigation. Therefore, the Court **GRANTS** the defendants' motion for summary judgment on the breach of warranty claim.

IV. Conclusion

For all of the foregoing reasons, the Court hereby **GRANTS** the defendants' motion to exclude the testimony of Dennis Carlson, and **GRANTS** the defendants'

motion for summary judgment as to all causes of action brought by the plaintiffs. The plaintiffs' claims are hereby **DISMISSED** with prejudice.

It is so **ORDERED.**

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PATRICK CARMICHAEL, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 93-0860-CB-S
SAMYANG TIRES, INC., et al., Defendants.	)	

ORDER

This matter is before the court on the plaintiffs' motion to reconsider the Court's April 1, 1996 order granting summary judgment to the defendants (tab 142). The Court hereby **GRANTS** the motion to reconsider; however, for the reasons set forth below, the court **AFFIRMS** its previous ruling.

On April 1, 1996, the Court granted the defendants' motions for summary judgment and dismissed this action with prejudice. In so doing, the Court declared the testimony of plaintiffs' expert Dennis Carlson ("Carlson") inadmissible under Rule 702 of the Federal Rules of Evidence, as interpreted by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993). Because Carlson's testimony constituted the plaintiffs' sole evidence that the tire in question suffered from a manufacturing or design defect, the court granted the defendants' motion for summary judgment as to plaintiffs' Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"), negligence, and wantonness causes

of action. The plaintiffs have asked the Court to reconsider this decision.

In their motion, the plaintiffs contend that the Court erred in the following four respects: (1) by applying a *Daubert* analysis to a mere "technical inspection" which is not scientific evidence; (2) by improperly evaluating the credibility and reliability of the results of Carlson's analysis, rather than his methodology; (3) by improperly narrowing the *Daubert* inquiry to consider only the four factors enumerated by the *Daubert* Court; and (4) by ruling that the *Daubert* criteria for admissibility were not satisfied in this case. The first of these arguments was considered and rejected by the Court in its previous order, and the plaintiffs have offered the Court no basis for reconsidering it at this time. The Court remains of the opinion that the weight of the authority is clear that the *Daubert* inquiry is in fact applicable to testimony such as that offered by Carlson. However, the plaintiffs' second, third, and fourth arguments in support of their motion merit further discussion, and will be addressed in turn.

A. Whether the Court Improperly Evaluated the Reliability of Carlson's Results

In their brief, the plaintiffs correctly point out that a court's focus in a *Daubert* inquiry must be on the reliability of the underlying principles and methodology employed by an expert, rather than on the credibility of that expert's results. *See Daubert*, 125 L.Ed.2d at 485 (trial courts must ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand"); *Joiner v. General Electric Co.*, 78 F.3d 524, 530 (11th

Cir. 1996) (cautioning lower courts to be careful not to "cross the line" between evaluating reliability of expert's methodology and disagreeing with expert's conclusions).

In light of the *Daubert* and *Joiner* holdings, the plaintiffs ask the Court to reexamine its ruling to determine whether it excluded Carlson's testimony based on the reliability of his results, rather than on the reliability of his methodology. The plaintiffs' concern is unfounded, as the Court's April 1, 1996 order in no way passed judgment on the validity of Carlson's conclusions. Rather, the Court, acting in its *Daubert*-imposed "gatekeeper" role, found the methodological foundation of Carlson's testimony to be lacking, and excluded his testimony on that basis, in accordance with Rule 702. Hence, the plaintiffs' assertion that the court improperly "crossed the line", in violation of *Joiner*'s admonition to the contrary, is devoid of merit.

B. Whether the Court Improperly Limited the Scope of the Daubert Inquiry

The plaintiffs next contend that the Court erred by considering only the four factors specifically enumerated by the Supreme court in *Daubert*.[1] The plaintiffs are correct that the Court's inquiry focused on the four

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[1] In support of this argument, plaintiffs point out that a *Daubert* footnote listed several sources which advance a multitude of other criteria which may be utilized in assessing the reliability of proffered expert testimony. *See Daubert*, 125 L.Ed.2d at 484 n.12. Plaintiffs have selected six factors set forth in one of these sources, and now argue that said criteria militate in favor of a finding of the reliability of Carlson's methods and, hence, the admissibility of his results. However, these six factors

reliability indicia identified by the Supreme Court in *Daubert*. Likewise, it is true that the *Daubert* Court stressed that the relevant inquiry should be "flexible" and that its "overarching subject [should be] the scientific validity" and reliability of an expert's methodology. *Daubert*, 125 L.Ed.2d at 484. Indeed, the list of criteria propounded in *Daubert* was intended neither to be exhaustive nor to apply in every case. *See Joiner*, 78 F.3d at 530.

However, the Eleventh Circuit has noted that, "[w]here appropriate, [the four factors identified in *Daubert*] serve as indicia of the reliability of the basis of an expert's testimony." *Id.* In this case, application of the *Daubert* factors did operate to gauge the reliability of Carlson's methods, and all of these factors indicated that his testimony was properly excluded. The Court's analysis revealed no countervailing factors operating in favor of admissibility which could outweigh those identified in *Daubert*, and the parties identified no such factors in their briefs. Contrary to plaintiffs' assertions, the Court did not convert the flexible *Daubert* inquiry into a rigid one; rather, the Court simply found the *Daubert* factors appropriate, analyzed them, and discerned no competing criteria sufficiently strong to outweigh them. As such, the Court's analysis complied with both the letter and spirit

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are of dubious merit, as the *Daubert* Court expressly declined the opportunity to express approval or disapproval of the reliability criteria upon which plaintiffs rely by stating that "all those versions [of the reliability inquiry] may well have merit, although we express no opinion regarding any of their particular details." *Id.*

of *Daubert*. Accordingly, this ground for reconsideration lacks merit.

C. *Whether the Court Improperly Evaluated the Daubert Factors*

Finally, the plaintiffs assert that several of the *Daubert* factors should have been found to work in favor of admissibility rather than against it. Specifically, the plaintiffs contend that, contrary to the Court's findings, Carlson's methodology is testable and refutable, is subject to peer review, and is commonly accepted in the relevant scientific community.[2] In its previous order, the Court provided a detailed justification for its finding that Carlson's results were neither testable nor refutable. Plaintiffs have not provided this Court with any reason to disturb its finding on the "testability" front, and the Court declines their open-ended invitation to do so.

Regarding the "peer review" criterion, plaintiffs concede that Carlson's methodology has not been the subject of publications or other conventional forms of peer review; nonetheless, they submit that his methods have been exposed to extensive review "in the fire of litigation". However, the fire of litigation is not an atmosphere which is conducive to careful, well-reasoned, scholarly analysis, critique, and review of the scientific underpinnings of expert testimony. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995)

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[2] Apparently, the plaintiffs do not dispute the Court's finding that the fourth *Daubert* criterion, the known or potential rate of error, operates against admissibility in this case.

("we may not ignore the fact that a scientist's normal workplace is the lab or the field, not the courtroom or the lawyer's office"). Additionally, the Court notes that similar tire-failure testimony has not fared well in such an atmosphere. *See Diviero v. Uniroyal Goodrich Tire Co.*, ___ F.Supp. ___, 1996 WL 146446 (D. Ariz., March 25, 1996) (excluding tire failure testimony under *Daubert*); *Clement v. Griffin*, 634 So.2d 412, 426-27 (La. App. 4th Cir. 1994) (same). The Court remains of the opinion that the subject of Carlson's testimony has not been exposed to rigorous scientific peer review procedures, and that the reliability of his methods is therefore attenuated.

Finally, the plaintiffs have presented evidence which purports to show that Carlson's techniques and methodology are "commonly accepted" in the relevant scientific community. Specifically, they offer an excerpted deposition transcript in which the defendants' expert testified that he also utilized a visual-inspection method of analyzing the tire at issue in this case, and that he took pictures and used a tread-depth measuring gauge in his work. Plaintiffs contend that this testimony reveals that the methodology and principles adopted by Carlson are widely accepted in the relevant community. The Court declines to make such a leap. The cited testimony indicates only that both experts adopted the basic techniques of collecting data. It says nothing about the component of Carlson's tire failure analysis which most concerned the Court, namely, the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis. There is no evidence whatsoever that the parties' experts on the proper analytical framework to be employed in assessing

data obtained from a visual inspection of a tire. Accordingly, this additional testimony does not alter the Court's previous findings as to this factor.

Although the plaintiffs make a powerful appeal to equity, it remains eminently clear that Carlson's testimony lacks sufficient indicia of reliability to be admissible under *Daubert* and Rule 702 of the Federal Rules of Evidence. Additionally, the plaintiffs argue that the Court should not have rejected Carlson's testimony until after conducting an evidentiary hearing in this matter. However, no hearing was necessary, as the Court carefully combed the hundreds of pages of deposition transcripts submitted by the parties before ruling on the admissibility of Carlson's testimony, and the plaintiffs have not alleged that any information material to the Court's inquiry was missing from those documents.

D. Conclusion

For all of the foregoing reasons, the Court hereby **GRANTS** the plaintiffs' motion for reconsideration. Upon reconsideration, however, the Court **AFFIRMS** its order of April 1, 1996, which order declared Carlson's testimony inadmissible and dismissed the plaintiffs' claims with prejudice.

It is so **ORDERED.**

DONE this the 5th day of June, 1996.

/s/ Charles R. Butler, Jr.
CHIEF DISTRICT JUDGE